Supreme Court, U.S.
FILED

No. 061121

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In the Supreme Court of the United States

PHILLIP GOODMAN, SR.,
Petitioner,

v.

HBD INDUSTRIES, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

DAVID HART NELSON
Counsel of Record
4 GEORGETOWN GREEN
CHARLOTTESVILLE, VA 22901
(434) 293-5750

DAVID H. DUNAWAY
100 SOUTH FIFTH STREET
POST OFFICE BOX 231
LAFOLLETTE, TN 37766
LAFOTTETTE: (423) 562-7085
KNOXVILLE: (865) 524-3670

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The petitioner was injured while working in the course of his employment so as to become entitled to workers' compensation benefits. For purposes of calculating his average weekly wage, however, the trial court included days the petitioner had not worked while on strike. Upon review, the Tennessee Supreme Court reversed that determination.

The question presented, therefore, is as follows:

Did the Tennessee Supreme Court err as a matter of federal labor law in failing to find that requiring days lost while on strike should be excluded from the petitioner's average weekly wage calculation?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Phillip Goodman, Sr. ("Mr. Goodman").

Respondent: HBD Industries, Inc. ("HBD"). Sue Ann Head, Director of the Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development and the Second Injury Fund were initially parties defendant to this action; however, Ms. Head and the Second Injury Fund were dismissed as parties defendant in the chancery court and thus are not involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Phillip Goodman, Sr. respectfully petitions for a writ of certiorari to review the specified judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The Scott County (Tennessee) Chancery Court entered an Order and Judgment in Mr. Goodman's case on October 27, 2005 (Appendix ["App."] B, *infra*, 16a). The Chancery Court Order and Judgment was reversed by the Tennessee Supreme Court in an Opinion filed on November 6, 2006 (App. A, *infra*, 1a).

JURISDICTION

The Opinion by the Tennessee Supreme Court was filed on November 6, 2006. This petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES, ARTICLE VI, PROVIDES IN PERTINENT PART:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 157, PROVIDES:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

SECTION 8(a) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 158(a) PROVIDES IN PERTINENT PART:

> "Unfair labor practices by employer. It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7
> ....
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ..."

STATEMENT OF THE CASE

This Petition seeks a review of findings by the Tennessee Supreme Court that including days lost to a strike in calculating an employee's average weekly wage for purposes of determining workers' compensation benefits does not

violate Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a).

Mr. Goodman worked for HBD and its predecessor B.F. Goodrich for more than 26 years, before he became injured. *Goodman v. HBD Industries, Inc.*, ___ S.W.3d ___, ___, 2006 Tenn.App. Lexis 991 at *2 (Tenn., filed November 6, 2006). The injury in question occurred on January 31, 2002, when Mr. "Goodman was pulling a hose by hand, the hose got stuck, and he 'got jerked down [and] to the left real severely.'" *Id.* at *3. Mr. Goodman "felt immediate pain in his back, left leg, neck, and left shoulder [and] reported this injury to his employer." *Id.* at *3.

Mr. Goodman was treated by Edward Kahn, M.D., an orthopedic surgeon and Lis Bellner, a pain specialist." *Id.* at *3. Dr. Kahn placed Mr. Goodman on significant restrictions. *Id.* at *4. HBD paid temporary benefits on account of this injury to Mr. Goodman. *Id.* at *4.

In the Spring of 2001, Mr. Goodman was a member of the Collective Bargaining Union ("the Union"). *Id.* at *2. Mr. Goodman had testified that "everyone working at the plant 'had to join the union.'" *Id.* at *2. In the Spring of 2001, the Union went out "on strike after HBD refused to bargain with the union regarding a new contract." *Id.* at 2*.

As a member of the Union, Mr. Goodman was required to abide by the Union's bylaws. *Id.* at *2. Under those bylaws, all Union members, including Mr. Goodman, were forbidden to cross the picket line and go to work notwithstanding the strike. *Id.* at *2-3. In fact, however, some unspecified number of employees did cross the picket line. *Id.* at 3*. Mr. Goodman was not among them.

In addition, HBD hired what politely is known as "replacement workers" or strikebreakers–but in common parlance as scabs–to work in the plant so as to replace the workers who honored the picket line. *Id.* at *3. In the event, the strike lasted 28 weeks, or until early January 2001, which is when Mr. Goodman returned to work for the approximate thirteen months until he suffered the injury in issue. *Id.* at *3.

There was never any question in these state court proceedings as to whether Mr. Goodman was entitled to workers' compensation benefits. The sole issue turned on whether the trial court properly excluded the 28 weeks of the strike for its calculations of Mr. Goodman's Average Weekly Wage ("AWW"). In the 52 weeks prior to his injury, Mr. Goodman earned $11,651.24, which calculates to an AWW of $224.06, or a Weekly Compensation Rate ("WCR"), of $149.38, under the rule of Tenn. Code Ann. § 50-6-102(3)(A) (repl. vol. 2005). *See Goodman v. HBD Industries, Inc., supra,* ___ S.W.3d at ___, 2006 Tenn.App. Lexis 991 at *4-5.

The trial court excluded the 28 weeks Mr. Goodman and his fellow Union members were on strike. *Id.* at *4. This entails that Mr. Goodman's WCR was calculated to be $388.77, *id.* at 4*; Order and Judgment ¶ 4 (App. B, *infra* 17a), instead of the $149.38 that would have been his WCR had the period of the strike been included in the calculation. *Goodman v. HBD Industries, Inc., supra,* ___ S.W.3d at ___, 2006 Tenn.App. Lexis 991 at *4-5.

Again, the question of whether the chancellor properly excluded the 28-week duration of the strike was the sole issue on appeal to the Tennessee Supreme Court. In its resolution of the appeal, that court followed the half-century-old decision in *Hartley v. Liberty Mutual Insurance Co.*, 197 Tenn. 504,

276 S.W.2d 1 (1954), which held that the time spent away from the job while on strike was a voluntary absence that should not be excluded when an injured worker's AWW is calculated.

In petitioner's view, this practice (which greatly benefits the employers who urge such practices upon the courts), violates federal labor law by restraining and coercing employees like Mr. Goodman in the exercise of their rights under federal labor law. Under well-settled constitutional principles as mandated by the Supremacy Clause, federal labor law preempts the local Tennessee practice of including days not worked on account of a legal strike in its average weekly wage calculus. The practice penalizes workers like Mr. Goodman who exercise their federal right to join a union and to take part in its activities. For those reasons, Mr. Goodman respectfully asks that his Petition be granted.

Lower Court Proceedings. The chancery court entered an order that excluded the period Mr. Goodman had been on strike from the computation of the petitioner's average weekly wage. (App. B, *infra*, 16a). The order was reversed on appeal to the Tennessee Supreme Court. (App. A *infra.*, 1a).

The specific portion of the opinion below for which Mr. Goodman seeks review provided in full as follows:

> *"C. Does federal labor law preempt Hartley?*
>
> Under federal law, employees have the right to form or join labor organizations as well as strike against their employer. See 29 U.S.C. §§ 157, 158. The National Labor Relations Act provides that '[i]t shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in

> the exercise of the rights guaranteed in [29 U.S.C. § 157]' and '[i]t shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a).
>
> "These sections of the Federal law only grant employees the right to form a union if they so desire. Although federal law grants employees the right to form a union, we decline to interpret that right to extend as far as requiring days lost while on strike to be excluded from the average weekly wage calculation."

Goodman v. HBD Industries, Inc., *supra*, ___ S.W.3d at ___, 2006 Tenn.App. Lexis 991 at *16 to *17.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

The Court has, upon review, long found the power of the States to enact and then to administer workers' compensation laws to be constitutional. *See, e.g., New York Central R.R. v. White*, 243 U.S. 188, 200-02, 37 S.Ct. 247, 61 L.Ed. 667 (1917). Needless to say, the Court has also long held that the exercise of that power must be consistent with the superior demands of federal labor law legislation. *See, e.g., Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

Here, the practice of including the time spent on strike in the calculation of an injured worker's AWW is at odds with

both the specific terms and the spirit of the National Labor Relations Act in general and Sections 7 and 8 of that enactment in particular. The result is that Tennessee workers–and perhaps workers in other jurisdictions–are denied their entitlement to workers' compensation benefits in a fashion that is directly contrary to the federal labor law which should be supreme in this matter. Tennessee, in other words, is not free to reduce benefits in this way notwithstanding NLRA §§ 7, 8. For those reasons, Mr. Goodman urges, his petition should be granted.

II. THE REQUIRED INCLUSION OF DAYS LOST ON STRIKE FOR PURPOSES OF CALCULATING PETITIONER'S AVERAGE WEEKLY WAGE TO DETERMINE HIS WORKERS' COMPENSATION BENEFITS VIOLATES THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §§ 157, 158(a).

A. Introduction.

The Tennessee court's reliance on *Hartley* is at odds with the philosophy undergirding labor law on both the state and federal level. Numerous decisions from other jurisdictions have, for example, rejected the view that time spent on strike should be included so as to reduce the worker's subsequent workers' compensation benefits. *See, e.g., Monterey Coal Co. v. Industrial Commission*, 79 Ill.2d 334, 403 N.E.2d 263, 265 (1980)(rejecting notion that time spent on strike should serve to reduce workers' compensation benefits); *Hawthorne v. Director, Office of Workers' Compensation Programs*, 844 F.2d 318, 320 (6th Cir. 1988) (Longshoreman's and Harbor Workers' Compensation Act Benefits Review Board case; held on appeal that sum of claimant's earnings "does not accurately and fairly approximate his annual earning capacity because it does not take into account time lost in the year

prior to the injury on account of a strike"); *United Parcel Service v. District of Columbia Department of Employment Services*, 834 A.2d 868, 873-74 (D.C.Ct.App. 2003)(also rejecting notion that time spent on strike should serve to reduce workers' compensation benefits); *Rakie v. Jefferson & Clearfield Coal & Iron Co.*, 262 Pa. 444, 105 A. 638, 639 (1918)(where coal mine was closed on account of labor dispute, employee's "idleness during this period was not due to any fault of his own" for workers' compensation purposes). Thus, even on a state level, the general rule without exception so far as Mr. Goodman can determine refuses to penalize a worker's benefits on account of time spent out on strike. That practice reflects and may even be a direct reaction to federal law on this issue for, as we will see below, federal law mandates this result in any event.

B. Federal Preemption.

There can be no doubt that federal preemption is a determinative issue in this case. Clearly, "Congress" power to pre-empt state [or territorial] law is derived from the Supremacy Clause of Art. VI of the Federal Constitution." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). As this Court has stated:

> These pre-emption principles are no less applicable in the field of labor law. Section 7 of the NLRA, 49 Stat. 452, as amended, 29 U. S. C. § 157, the provision involved in this case, neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field of labor-management relations. See *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U.S. 519,

> 540 (1979); *Garner* v. *Teamsters*, 346 U.S. 485, 488 (1953) ("The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much"). The Court has, however, frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause. See, *e. g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 239-240 (1967) (invalidating state unemployment compensation law); *Bus Employees* v. *Missouri*, 374 U.S. 74, 81-82 (1963) (striking down state statute prohibiting peaceful strikes against public utilities); *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 394 (1951) (same); *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 458-459 (1950) (invalidating state "strike-vote" legislation).

Brown v. Hotel & Restaurant Employees, 468 U.S. 491, 501-02, 104 S. Ct. 3179, 82 L. Ed. 2d 373 (1984). If, therefore, the practice decreed in *Hartley* and followed in Mr. Goodman's case violates NLRA §§ 7, 8, it is settled in this Court that federal law would then preclude the practice on a state level through application of the doctrine of preemption.

C. The Tennessee decision violates the NLRA.

Those cited decisions precluding the *Hartley* approach offer strong hints as to why in the end federal law is paramount in this area and why, as a consequence, the practice of excluding time off for strikes in Tennessee is violative of that law. As the Illinois court in *Monterey* concluded:

> It is our conclusion that labor disputes such as strikes should be considered to be unavoidable causes within the meaning of section 10(b) of the Workmen's Compensation Act (Ill. Rev. Stat. 1971, ch. 48, par. 138.10(b)). Since there is no clear legislative direction in the matter, we refuse to confront the individual employee with the dilemma of choosing between, on the one hand, participating in a strike and thus risking a substantial reduction in workmen's compensation benefits should he be injured within the ensuing year and, on the other hand, declining to participate in a strike and thereby facing fines and perhaps expulsion from the union.

Monterey Coal Co. v. Industrial Commission, *supra*, 403 N.E.2d at 265. Indeed, it is, in fact, the very act of putting the worker to the Hobson's choice of either striking and potentially losing workers' compensation benefits or being fined by his union or perhaps even ejected from its membership that violates NLRA §§ 7, 8.

In that regard, there is no doubt that, in general terms at least, a union has the right to fine members who cross the picket line and work during a strike. A Sixth Circuit case summarized the Court's holdings in this area as follows:

> Nevertheless, fining a union member is not *per se* a violation of the Act. In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-93, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967), the Court held that a union has the right to prescribe its own rules respecting the acquisition or retention of membership, including the right to impose fines that carry an explicit or implicit threat of expulsion for nonpayment. In *Scofield* [*v.*

> *NLRB]*, 394 U.S.[423] at 430-36 [89 S. Ct. 1154, 22 L. Ed. 2d 385 (1969)], the Court upheld a union rule assessing fines, enforceable by threat of expulsion or judicial action, against members who violated a bylaw limiting the daily wages that members working on an incentive basis could earn. The bylaw was enacted to combat the threat of an employer-instituted production speed-up. The Court recognized that the rule was applicable only to voluntary union members and that any union member retained the freedom to resign and escape the rule. *Id.* at 435.

Lee v. NLRB, 325 F.3d 749, 755 (6th Cir. 2003).

By forcing all Tennessee union members covered by workers' compensation either to cross the picket line or to risk receiving reduced benefits should they subsequently suffer an injury on the job, the decision below has violated NLRA § 7's guarantee that "employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities." *NLRB v. Granite State Joint Board., Textile Workers Union, Local 1029*, 409 U.S. 213, 216, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972); *cf. Pattern Makers' League v. NLRB*, 473 U.S. 95, 104, 105 S. Ct. 3064, 87 L. Ed. 2d 68 (1985)(labor union's constitution barring employees from resigning during strike violates congressional policy of voluntary unionism implicit in section 8(a)(3)).

Certainly, as the excerpt from the decision rendered below reveals, the Tennessee Supreme Court recognized the problem –at least in theory. *See Goodman v. HBD Industries, Inc., supra,* ___ S.W.3d at ___, 2006 Tenn.App. Lexis 991 at *16.

It did not, however, draw the proper conclusion upon its consideration of that issue. *Id.* at *16 to *17.

Tennessee is a right-to-work state. There is no question that it is free to structure its labor relations law in that fashion. Tennessee is decidedly not free, however, to draw the conclusion from that permitted arrangement that any absence from work during a strike is, therefore, necessarily voluntary for purposes of calculating workers' compensation benefits. Such a view ignores the right of the Union to fine or expel members who cross the picket line even in right-to-work states. It ignores the strife that crossing the picket line would engender among fellow workers and union members; in no way, in view of these realities, could the decision whether or not to cross the picket line be said to be a purely voluntary act. The decision to become or not to become a strikebreaker does not take place in a vacuum; it takes place in the highly-charged context of union bylaws and fellow employee relations. The result is that the Tennessee practice of treating strike-mandated absences from work as voluntary acts therefore chills the right of Mr. Goodman and others under the NLRA freely and in a non-coercive manner "to join a union and participate in those concerted activities." *NLRB v. Granite State Joint Board., Textile Workers Union, Local 1029, supra,* 409 U.S. at 216, 93 S. Ct. 385 (1972). For that reason, Mr. Goodman contends, his petition should be granted, the decision below should be disapproved, and Tennessee's practices in this area should be brought into line with existing federal standards as embodied in, and mandated by, the NLRA.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioner Phillip Goodman, Sr. respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court of Tennessee

Respectfully submitted,

PHILLIP GOODMAN, SR.

By counsel

David Hart Nelson
Counsel of Record
4 Georgetown Green
Charlottesville, VA 22901
(434) 293-5750

David H. Dunaway
100 South Fifth Street
Post Office Box 231
LaFollette, TN 37766
LaFollette: (423) 562-7085
Knoxville: (865) 524-3670

Counsel for Petitioners

APPENDIX

APPENDIX A

SUPREME COURT OF TENNESSEE
AT KNOXVILLE
September 7, 2006 Session

No. E2005-02661-SC-R3-CV

[Filed November 6, 2006]

PHILLIP GOODMAN, SR.)
)
v.)
)
HBD INDUSTRIES, INC., ET AL.)
)

Direct Appeal from the Chancery Court for Scott County
No. 8843. Billy Joe White, Chancellor

JUDGES: WILLIAM M. BARKER, C.J., delivered the opinion of the court, in which JANICE M. HOLDER, CORNELIA A. CLARK, and GARY R. WADE, JJ., and E. RILEY ANDERSON, SP.J., joined.

The sole issue in this workers' compensation action is whether weeks spent absent from work due to a strike are included when calculating an employee's average weekly wage. The employee was on strike for twenty-eight weeks and had been back at work for less than a month before becoming injured. The trial court awarded permanent partial disability.

When calculating the weekly benefit, the court excluded from its calculation of the employee's average weekly wage those weeks during which the employee was on strike. On appeal, the employer argues that the trial court erred in this calculation. We accepted review before the case was heard or considered by the Special Workers' Compensation Appeals Panel. We hold that the trial court erred in excluding the weeks spent on strike in determining the employee's average weekly wage. Because the employer does not appeal the compensability of the injury or the extent of disability, we affirm the trial court's decision award of benefits, with the amount of benefits modified to reflect the proper calculation of the employee's average weekly wage.

OPINION

I. Factual Background

The Plaintiff, Phillip Goodman ("Goodman"), had worked for HBD Industries, Inc. ("HBD") or its predecessor B.F. Goodrich for approximately twenty-six years before becoming injured. Goodman was a member of the Collective Bargaining Union ("the union") at HBD, and, according to Goodman, everyone working at the plant "had to join the union." In the spring of 2001, the union voted to go out on strike after HBD refused to bargain with the union regarding a new contract. Goodman testified that, as a member of the union, he was required to abide by the union bylaws, which forbid union members from crossing the picket line to return to work. However, some employees did cross the picket line and return to work. HBD also hired a number of replacement workers to fill in for the striking workers. The strike lasted twenty-eight weeks, ending in early January 2002.

When Goodman returned to work after the strike, he was working as a "lead head operator," responsible for setting up and running "a medium hose line." On January 31, 2002, when Goodman was pulling a hose by hand, the hose got stuck and he "got jerked down [and] to the left real severely." He felt immediate pain in his back, left leg, neck, and left shoulder. He reported this injury to his employer.

HBD sent Goodman to Dr. Edward Kahn, an orthopedic surgeon, for treatment. Goodman also received treatment from Dr. Lisa Bellner, a pain specialist. An MRI revealed a herniated disc in Goodman's neck, causing deformity of the spinal cord and impinging on the nerve root on the left side. Dr. Kahn opined that this herniated disc was the cause of the pain in Goodman's neck, shoulder, and left arm. Goodman was treated conservatively with medication and physical therapy. Dr. Kahn opined that when he examined Goodman on August 27, 2002, Goodman had reached maximum medical improvement with respect to the neck injury. Dr. Kahn restricted Goodman to light duty work with occasional lifting of up to twenty pounds and frequent lifting of up to ten pounds, with no repetitive bending, stooping, or twisting. HBD paid temporary workers' compensation benefits to Goodman for this neck injury arising out of the January 31, 2002, accident.

Goodman filed a complaint for workers' compensation benefits in the Chancery Court for Scott County on April 18,

2002.[1] A hearing was held on October 11, 2005. The trial court issued an order on October 27, 2005, finding that Goodman had been injured within the course and scope of his employment with HBD and that he had sustained permanent partial disability to the extent of sixty-six percent to the body as a whole. The trial court awarded Goodman a lump-sum judgment totaling $102,529.68, which equaled 264 weeks of benefits at a rate of $388.77 per week. In the fifty-two weeks prior to his injury, Goodman had earned $11,651.24. In calculating Goodman's weekly compensation rate, the trial court deducted the twenty-eight weeks during which Goodman was on strike. Had the court included those weeks in the calculation, the weekly compensation rate would have been $149.38.

HBD filed a notice of appeal on November 16, 2005, challenging the trial court's computation of Goodman's average weekly wage and weekly compensation rate. HBD did not appeal the finding that the injury was sustained in the scope and course of employment or the assessment of sixty-six percent permanent partial disability. We accepted review before the case was heard or considered by the Special Workers' Compensation Appeals Panel.

II. Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the

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[1] Suit was also filed against Sue Ann Head, Director of the Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development, Second Injury Fund. Sue Ann Head and the Second Injury Fund were dismissed from the case in chancery court and are not party to this appeal.

trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); *see also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004); *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003). Conclusions of law are subject to de novo review without any presumption of correctness. *Rhodes*, 154 S.W.3d at 46; *Perrin*, 120 S.W.3d at 826.

III. Analysis

A. Application of Hartley v. Liberty Mut. Ins. Co.

The only issue on appeal is whether the trial court erred in excluding the twenty-eight weeks during which Goodman was out on strike when calculating his average weekly wage. HBD relies on *Hartley v. Liberty Mut. Ins. Co.*, 197 Tenn. 504, 276 S.W.2d 1 (Tenn. 1954), to support its argument that time spent away from work due to a strike is a voluntary absence and should not be excluded in calculating the weekly wage. Goodman argues in response that *Hartley* is no longer good law, or, in the alternative, *Hartley* does not apply to the facts of this case. Specifically, Goodman argues that *Hartley* is more than half a century old, "has never been followed, in Tennessee or anywhere else," fails to deal with the impact of federal labor law on the issue at hand, and is "an anomalous relic of a prior age that should be given a merciful burial, at least insofar as the issue in this case is concerned." We agree with HBD that *Hartley* controls the outcome of this case, and, therefore, the twenty-eight weeks during which Goodman participated in the strike are to be included when calculating his average weekly wage.

When calculating the weekly compensation rate, a trial court must first determine the employee's average weekly wage. An employee's average weekly wage is defined by statute:

> "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during the period when the injured employee did not work, although not in the same week, then the earnings for the remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted[.]

Tenn. Code Ann. § 50-6-102(3)(A) (2005). The compensation rate is two thirds of that average weekly wage. Tenn. Code Ann. § 50-6-102(15)(A)(viii) (2005).

Deducting days not worked from the calculation of the average weekly wage benefits the employee because the wages for the fifty-two-week period will be divided by a smaller number of days worked, resulting in a higher average weekly wage. Goodman earned $11,651.24 in the fifty-two weeks prior to his injury. If we include the weeks spent on strike, Goodman's average weekly wage would equal $224.06, making the weekly rate of compensation $149.38. However, the trial court excluded the twenty-eight weeks

spent on strike and awarded Goodman benefits at $388.77 per week.[2]

The determination of whether days an employee does not work should be deducted from the computation of the average weekly wage is dependent upon the facts and circumstances of each case. *Cantrell v. Carrier Corp.*, 193 S.W.3d 467, 472 (Tenn. 2006). In making this determination, we ask whether the employee lost time from work due to "the employee's voluntary act, or . . . the act and choice of the employer for [the employer's] benefit and convenience." *Bryant v. McAllister*, 202 Tenn. 654, 308 S.W.2d 412, 414-15 (Tenn. 1957). Voluntary absences from work are not deducted from the fifty-two week period. *Id.*; *see also Hartley*, 276 S.W.2d at 3. By contrast, days not worked by an employee must be deducted from the fifty-two week period if the inability to work is the result of "sickness, disability, or some other fortuitous circumstance." *Russell v. Genesco, Inc.*, 651 S.W.2d 206, 210 (Tenn. 1983). Examples of "fortuitous circumstances" include the closing of a plant for repairs or a reduction of work due to an unforeseen shortage of material or a lack of orders. *See Cantrell*, 193 S.W.3d at 472 (citing *Hartley*, 276 S.W.2d at 4; *Bryant*, 308 S.W.2d at 413-14).

In *Hartley*, this Court addressed the exact question we are faced with today: should the time the employee spent on strike against the employer be excluded when calculating an employee's average weekly wage? 276 S.W.2d at 2-3. The employee in *Hartley* had taken part in a sixteen-week strike

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[2] It is unclear how the trial court arrived at this figure. If the twenty-eight weeks are excluded, the income of $11,651.24 is divided by 24 weeks, equaling $485.47, two-thirds of which is $323.65.

against his employer. *Id.* at 2. Of those sixteen weeks, the plant was closed for eight weeks for repairs. *Id.* After returning to work, the employee was injured within the course and scope of his employment. *Id.* When calculating the employee's average weekly wage, the trial court deducted eight weeks, representing the eight weeks during which the plant was closed, but included the other eight weeks during which the employee was on strike. *Id.* We affirmed, holding that the trial court correctly deducted the eight weeks for the plant closure and that the period for the strike could not be deducted because the employee's "total earnings for the year were reduced by his own voluntary act." *Id.* at 3.

> The average weekly wage of an employee should not, and is not, decreased for reasons over which he has no control, such as closing a plant for repairs[,] . . . occasional suspension of operations due to bad weather, unforseen shortage of material, lack of orders, lack of cars, slack season, etc. It is observed that all of the foregoing are occasions and conditions resulting in the cessation of operations by the employer, and should not be considered in determine the average weekly wage of an injured employee. But a strike, in which the employee voluntarily participates, does not fall within the same category.

Id.

Goodman acknowledges that "purely voluntary" absences from work should be included in the employee's average weekly wage calculation. However, he argues that his absence for work was not voluntary, and, therefore, *Hartley* should not apply. Goodman asserts that he was required to join the union and that, as a member of the union, he was required to participate in the strike. This assertion is incorrect. First,

Tennessee Code Annotated sections 50-1-201 through 204 prohibit any requirement that an individual join or not join a union and makes a violation thereof a criminal offense. Thus, by law, Goodman could not be required to join the union as a condition to his continued employment with HBD. Additionally, Goodman acknowledged at trial that, during the strike, some of the employees chose to cross the picket line and continue working, and HBD had work available to him. Therefore, while Goodman might have felt pressured to participate in the strike, his participation was not required and was in fact voluntary.

In this case, the trial court declined to follow *Hartley*, not because it did not apply but because the court found it unfair: "the Court certainly does not wish to diminish what little this man will get for this injury. Workmans' [sic] comp pays little enough as it is, contrary to what our government thinks. The Court will hold against this [Hartley] rule in every way possible." Goodman agrees that *Hartley* should be reversed as it is outdated, unfair, and "has never been followed, in Tennessee or anywhere else." We are unpersuaded by Goodman's arguments and find no reason to depart from the long-standing precedent established in *Hartley*.

Since *Hartley*, we have not specifically revisited the issue of whether absence from work due to a strike is to be included in calculating the average weekly wage. However, *Hartley* has been cited with approval several times, particularly when drawing the distinction between voluntary and involuntary absences from work. *See, e.g.*, *Cantrell*, 193 S.W.3d at 472; *Bryant*, 308 S.W.2d at 414-15. Whether the decision in *Hartley* has been followed in other jurisdictions is not persuasive, given the statutory nature of workers' compensation law.

Not only have we chosen not to overrule the decision in *Hartley*, but the Legislature has also expressed its tacit acceptance of the decision, in that it has chosen not to overrule it by statute.

> The legislature is presumed to know the interpretation which courts make of its enactments; the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, especially where the law is amended in other particulars, or where the statute is reenacted without change in the part construed.

Hamby v. McDaniel, 559 S.W.2d 774, 776 (Tenn. 1977) (citations omitted); *see also Biscan v. Brown*, 160 S.W.3d 462 (Tenn. 2005) (holding that the legislature is presumed to know the state of the law).

Because there is no valid reason to overrule *Hartley*, we apply the rule from that case and hold that the twenty-eight weeks during which Goodman was on strike should be included when calculating his average weekly wage. As such, his weekly benefit amount is $ 149.38, not the $ 388.77 awarded by the trial court.

B. Calculating benefits under section 50-6-102(3)(B)

In the alternative, Goodman argues that his benefits should be calculated using the provisions of Tennessee Code Annotated section 50-6-102(3)(B) because his period of employment with HBD was less than fifty-two weeks due to the strike. Tennessee Code Annotated section 50-6-102(3)(B) provides:

> Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained. . . .

By its very terms, this section only applies when an employee's "employment prior to the injury extends over a period of less than fifty-two . . . weeks." *Id.*

Essentially, Goodman argues that the twenty-eight weeks he spent on strike severed his prior employment relationship with HBD, and the time after the strike was a new period of employment. However, Goodman had been employed by HBD for many years prior to the strike, and he maintained a continuous employment relationship with HBD notwithstanding the strike. He then returned to work for HBD following the strike, evidencing an ongoing employment relationship despite the period of inactivity. Therefore, section 50-6-102(3)(B) does not apply.

The Workers' Compensation laws do not permit an employee to choose the average weekly wage calculation that yields the highest result. The employee must follow the sequence outlined in Tennessee Code Annotated section 50-6-102(3). If the employee is employed for fifty-two weeks prior to the injury, the employee must use subsection (A). If the employee was employed for less than fifty-two weeks prior to the injury, the employee must use subsection (B). Here, Goodman was employed by HBD for the full fifty-two weeks prior to his injury. Therefore, subsection (A) applies, and his income earned during those fifty-two weeks is divided by fifty-two to arrive at his average weekly wage.

C. Does federal labor law preempt Hartley?

Under federal law, employees have the right to form or join labor organizations as well as strike against their employer. *See* 29 U.S.C. §§ 157, 158. The National Labor Relations Act provides that "[i]t shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. § 157]" and "[i]t shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a).

These sections of the Federal law only grant employees the right to form a union if they so desire. Although federal law grants employees the right to form a union, we decline to interpret that right to extend as far as requiring days lost while on strike to be excluded from the average weekly wage calculation.

IV. Conclusion

In sum, we reaffirm our prior decision in *Hartley* and hold that the twenty-eight weeks that Goodman spent on strike are to be included when calculating his average weekly wage. HBD does not appeal the trial court's finding of sixty-six percent permanent partial disability. Therefore, we affirm the trial court's award of 264 weeks of benefits, payable as one lump sum, but at a weekly compensation rate of $149.38 instead of $388.77.

Costs of this appeal are taxed to Phillip Goodman, and his surety, for which execution may issue if necessary.

/s/_____
WILLIAM M. BARKER, CHIEF JUSTICE

SUPREME COURT OF TENNESSEE
AT KNOXVILLE
September 7, 2006 Session

No. E2005-02661-SC-R3-CV

[Filed November 6, 2006]

PHILLIP GOODMAN, SR.	)
	)
v.	)
	)
HBD INDUSTRIES, INC., ET AL.	)
	)

Direct Appeal from the Chancery Court for Scott County
No. 8843. Billy Joe White, Chancellor

JUDGMENT

This case was heard upon the record on appeal from the Chancery Court for Scott County, and upon consideration of the record, briefs and arguments of counsel, this Court is of the opinion that the trial court erred in excluding the weeks spent on strike in determining the employee's average weekly wage. Because the employer does not appeal the compensability of the injury or the extent of disability, we affirm the trial court's decision award of benefits, with the amount of benefits modified to reflect the proper calculation of the employee's average weekly wage.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the judgment of the Chancery Court for Scott County is Affirmed as Modified.

This case is remanded to the Chancery Court for Scott County for execution of judgment and collection of costs.

Costs of this appeal shall be paid by Phillip Goodman, Sr.

APPENDIX B

IN THE CHANCERY COURT FOR SCOTT COUNTY, TENNESSEE AT HUNTSVILLE

CIVIL ACTION NO. 8843

[Filed October 27, 2005]

PHILLIP GOODMAN, SR.,	)
Plaintiff,	)
	)
v.	)
	)
HBD INDUSTRIES, INC., and	)
SUE ANN HEAD, DIRECTOR	)
OF THE DIVISION OF WORKERS'	)
COMPENSATION, TENNESSEE	)
DEPARTMENT OF LABOR	)
AND WORKFORCE DEVELOPMENT,	)
SECOND INJURY FUND,	)
Defendants.	)
	)

ORDER AND JUDGMENT

This matter came to be heard on the 11th day of October, 2005 before the Honorable Billy Joe White, Chancellor for the Chancery Court for Scott County, Tennessee at Huntsville, Tennessee, upon the pleadings, testimony in open

court, and the record as a whole, from all of which the Court issued an Opinion, a copy of which has been or will be filed and incorporated by reference herein, and the Court further finds:

1. That on or about January 31, 2002, while employed in the course and scope of his employment as a lead operator for the Defendant, HBD Industries, Inc., the Plaintiff was pulling a hose from a lapper machine to an extruder machine when he sustained injuries to his neck.

2. The Court finds that the Defendant, HBD Industries, Inc., received timely notice of the Plaintiff's injuries.

3. The Court further finds that the Plaintiff's injuries to his neck are casually related to the Plaintiff's accident which occurred on or about January 1, 2002.

4. That at the time of the Plaintiff's injuries, the Plaintiff was making sufficient earnings to entitle the Plaintiff to workers' compensation benefits at a workers' compensation rate of pay of Three Hundred and Eighty-Eight Dollars and Thirty-Seven Cents ($388.37) per week.

5. That the proof in this cause, including the medical evidence, the testimony of the Plaintiff, and the entire record established that the Plaintiff sustained permanent partial disability to the extent of sixty-six percent (66%) disability to the body as a whole.

6. The Court further finds that the Plaintiff is entitled to disability benefits which accrued since August of 2002, and that the Plaintiff has a special need to receive his disability benefits in a lump sum payment and that the Plaintiff can wisely manage his disability benefits, for which the Plaintiff

is entitled to a judgment from the Defendant, HBD Industries, Inc., for two hundred and sixty-four (264) weeks at the workers' compensation rate of pay of Three Hundred and Eighty-Eight Dollars and Thirty-Seven Cents ($388.37) per week for a total lump sum in the amount of One Hundred and Two Thousand, Five Hundred and Twenty-Nine Dollars and Sixty-Eight Cents ($102,529.68).

7. That the Second Injury Fund should be dismissed.

8. The Court further finds that the Plaintiff has established a need for future medical treatment related to this neck.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, HBD Industries, Inc., shall furnish such future medical expenses for the Plaintiff's injuries which he sustained to his neck arising out of and in the course and scope of the Plaintiff's employment with the Defender, HBD Industries, Inc., which occurred on or about January 31, 2002, including medical treatment to the Plaintiff's neck as otherwise caused by said physical injuries and as otherwise required and defined by Section 50-6-204 of the Tennessee Code Annotated.

2. That the Plaintiff's injuries are compensable under the Tennessee Workers' Compensation Act. That the Defendant, Sue Ann Head, Director of the Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development, Second Injury Fund, shall be dismissed.

3. That the Plaintiff shall receive a judgment from the Defendant, HBD Industries, Inc., in the amount of One Hundred and Two Thousand, Five Hundred and Twenty-Nine Dollars and Sixty-Eight Cents ($102,529.68), all of which shall be paid in one lump sum.

4. That on Motion of the Plaintiff's attorney, David H. Dunaway, it is **ORDERED** that the Plaintiff's attorney is awarded attorney fees and a lien not to exceed twenty percent (20%) of this judgment or Twenty Thousand, Five Hundred Dollars and Ninety-Three Cents ($20,505.93).

6. That on Motion of the Plaintiff, and for good cause shown, it is also **ORDERED** that payment of Plaintiff's benefits shall be spread out over his actuarial life, which is 35.57 years or 426.84 months from January 31, 2002, the date the Plaintiff last worked forward, pursuant to the 1983 Individual Mortality Table VI, Volume 13 of the Tennessee Code Annotated of the total sum of $102,529.68, which is to be paid to the Plaintiff, less attorney fees and expenses for a net sum of $78,358.35 based on 426.84 months life expectancy, which would represent the amount of $183.58 per month for the remainder of the Plaintiff's life. Therefore, the set off for social security or other disability benefits shall be $183.58 per month.

7. That any discretionary costs shall be addressed by the filing of further motion of the Plaintiff.

8. The court costs of this case shall be taxed to the Defendant, HBD Industries, Inc., in care of its attorney, David M. Sanders, Spicer, Flynn & Rudstrom, PLLC, 800 S. Gay Street, Suite 1400, Knoxville, Tennessee 37929, for which execution may issue if necessary.

ENTER this 26 day of October, 2005.

/s/_____
CHANCELLOR

APPROVED FOR ENTRY:

/s/_____
DAVID H. DUNAWAY, BPR 0491
ATTORNEY FOR PLAINTIFF
P. O. Box 231
LaFollette, TN 37766

SPICER, FLYNN & RUDSTROM, PLLC

BY:_____
DAVID M. SANDERS, BPR
ATTORNEY FOR DEFENDANT
HBD INDUSTRIES, INC.
800 S. Gay Street, Suite 1400
Knoxville, TN 37929
(865) 673-8516

/s/_____
Alexandra Deas, BPR
Attorney for Defendant, Sue Ann Head
Director of the Division of Workers'
Compensation, Tennessee Department of Labor
and Workforce Development, Second Injury Fund
610 University Avenue, 2nd Floor
Knoxville, Tennessee 37921